Supreme Court, U.S.
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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

HARLEY-DAVIDSON, INC.,

Petitioner,

v.

MINSTAR, INC., and AMF INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Does Section 107(e)(1), 42 U.S.C. § 9607(e)(1), of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") prohibit indemnification agreements between CERCLA "potentially responsible parties" ("PRPs"), such as Harley-Davidson, Inc. ("Harley-Davidson") and AMF Incorporated ("AMF")?

B. May a court disregard other relevant equitable considerations, such as the "Gore Factors", and base allocation of CERCLA liability among PRPs solely upon an indemnification agreement?

C. Did the United States Court of Appeals for the Seventh Circuit properly bar Harley-Davidson's claim against AMF and its corporate parent, Minstar, Inc. ("Minstar"), when (i) the indemnification agreements at issue in this action raise disputed material

issues of triable fact which were not the subject of this appeal and have not been considered by the District Court; (ii) the Seventh Circuit apparently relied on only one of the two indemnification agreements between the parties; and (iii) the Seventh Circuit did not apply the proper state-law rule of construction for indemnification agreements -- that the court construe any ambiguity against the drafter?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

PARTIES iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BY OTHER COURTS 2

JURISDICTION 3

INTRODUCTION 6

STATEMENT OF THE CASE 7

FEDERAL JURISDICTION BELOW 16

SUMMARY OF ARGUMENT 17

I. THIS COURT HAS NOT DECIDED THE IMPORTANT QUESTION OF WHETHER SECTION 107(e)(1) OF CERCLA PERMITS INDEMNIFICATION AGREEMENTS BETWEEN POTENTIALLY RESPONSIBLE PARTIES 20

II. THE SEVENTH CIRCUIT APPARENTLY DID NOT CONSIDER ANY EQUITABLE FACTORS OTHER THAN THE 1980 INDEMNIFICATION AGREEMENT BETWEEN AMF AND AMF YORK ... 33

III. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COMMITTED JUDICIAL ERRORS IN THIS CASE THAT WILL GO UNREMEDIED IF THE SUPREME COURT DOES NOT GRANT CERTIORARI 40

A. The Seventh Circuit Appears to Have Relied On Only One of the Two Essential Indemnification Agreements in This Case 41

B. The Seventh Circuit Did Not Apply The Proper Rules For Construing Indemnification Agreements 47

CONCLUSION 52

TABLE OF AUTHORITIES

CASES

AM Intern., Inc. v. International Forging Equipment, 743 F. Supp. 525 (N.D. Ohio 1990), rev'd in part, 982 F.2d 989 (6th Cir. 1993) 24, 30

Beazer East v. The Mead Corp., 34 F.3d 206, 211 (3d Cir.) reh'g denied (1994) 18, 24, 25 28, 48

Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993) 24, 30

CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991), reconsideration denied sub nom, U.S. v. Cordova Chemical of Michigan, 1991 WL 111515 (W.D. Mich., March 26, 1991) 24

Danella Southwest v. Southwestern Bell Telephone, 775 F. Supp. 1227, 1240 (E.D. Mo. 1991), aff'd, 978 F.2d 1263 (8th Cir. 1992) 24

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L.Ed. 398 (1952) 48

DiPetro v. City of Philadelphia, 496 A.2d 407, 410 (Pa. Super. 1985) 49

Environmental Trans. Systems v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992) 36, 38

Fisher Development Co. v. Boise Cascade Corp., 37 F.3d 104, 109 (3d Cir. 1994) 48

Folino v. Hampden Color and Chemical Co., 832 F. Supp. 757, 760 (D. Vt. 1993) 29

Gross v. Sweet, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365, 367 (Ct. App. 1979) 51

Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir.), reh'g denied (1994) ..... passim

Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993), rev'd, 41 F.3d 341 (7th Cir.), reh'g denied (1994) 2, 13, 23

Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986) 50

John S. Boyd Co., Inc., v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) ... 24, 25, 30, 48

Jones-Hamilton v. Beazer Materials & Services, 973 F.2d 688, 692 (9th Cir. 1992) 18

Joslyn Manufacturing Co. v. Koppers Company, Inc., 40 F.3d 750 (5th Cir. 1994) 25

Kerr-McGee Chemical v. Lefton Iron & Metal, 14 F.3d 321 (7th Cir.), reh'g denied (1994) 34, 36

Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) .... passim

Niecko v. EMRO Marketing Co., 973 F.2d 1296 (6th Cir. 1992) 25, 31

Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992), aff'd in part, vacated in part, 5 F.3d 10 (2d Cir. 1993) 27

Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993) 27, 30, 48

Peterson v. Sealed Air Corp., 902 F.2d 1232, 1233 (7th Cir.), reh'g denied (1990) 46

Ramos v. Browning-Ferris Industries of South Jersey, 103 N.J. 177, 191, 510 A.2d 1151 (N.J. 1986) 51

Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990) 24

Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988) 31

Spivey v. Great Atlantic & Pacific Tea Co., 255 N.W.2d 469 (Wis. 1977) .. 51

Tippins Inc. v. USX Corp., 37 F.3d 87 (3d Cir. 1994) 48, 49

U.S. v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) 36

U.S. v. Hardage, 985 F.2d 1427 (10th Cir. 1993) ..... passim

U.S. v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991) 38

U.S. v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1013 (D.S.C. 1984), Aff'd in part and vacated in part sub. nom., U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) 29

CONSTITUTIONS AND STATUTES

28 U.S.C. § 1292(b) 14

28 U.S.C. § 1331 16

28 U.S.C. § 1332 17

28 U.S.C. § 1367 17

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) 3, 11, 12

Section 107(e)(1) of CERCLA, 42 U.S.C. § 9607(e)(1) ..... passim

Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) 13, 16

Section 113(f) of CERCLA, 42 U.S.C. § 9613(f)(1) 5, 13

35 Pa. Stat. §§ 701, 702, 705 11

OTHER SOURCES

EPA Enforcement, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,179 (April 1993) 21

Steven Ferrey, The New Wave: Superfund Allocation Strategies and Outcomes, 25 Environment Reporter 790 (8/26/94) 21

Eve L. Pouliot, Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund), 47 SMU L. Rev. 607 (1992) 21

Restatement (Second) Conflict of Laws §§ 222, 224(2) (1971) 49

U.S. EPA, CERCLA-3rd Quarter FY 92 Superfund Management Reporter, (June 30, 1992) 21

Charles A. Wright, et al., Federal Practice and Procedure, § 3921 (1977) 46

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harley-Davidson, Inc. ("Harley-Davidson"), by its attorneys, asks that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on November 30, 1994.

OPINIONS BY OTHER COURTS

1. Decision of which review is sought: Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir.), reh'g denied (1994) (Appendix A).

2. Grant of Stay of Mandate: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (1/6/95) (Appendix B).

3. Denial of Motion for Rehearing, with Suggestion for Rehearing En Banc: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (12/28/94) (Appendix C).

4. District Court decision: Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993) (Appendix D).

JURISDICTION

The Court of Appeals for the Seventh Circuit rendered its judgment in this matter on November 30, 1994. Harley-Davidson's motion for rehearing, with suggestion for en banc, was denied on December 28, 1994. Harley-Davidson's motion for stay of mandate was granted on January 6, 1995. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107(a) of CERCLA:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or

> treatment, of hazardous substances owned or possessed by such person, by any party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person,
>
> from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607(a).

Section 107(e)(1) of CERCLA:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a

> release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1).

Section 113(f)(1) of CERCLA:

> Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this section shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

42 U.S.C. § 9613(f)(1).

INTRODUCTION

Companies which buy or sell contaminated properties often negotiate the issue of whether one party to the transaction will indemnify the other from potential environmental liability under CERCLA. The purchase and sale contracts which these companies negotiate typically allocate the risk of CERCLA environmental liability between buyer and seller. Because cleaning up polluted sites can be quite costly -- often running into the millions of dollars -- these environmental liability allocation contracts frequently are challenged in federal courts on the grounds they contravene the CERCLA principle that the polluter pays and violate Section 107(e)(1) of CERCLA.

This case presents this Court with the opportunity to define the appropriate standard for determining whether such an indemnity contract is

enforceable and to provide contracting parties, federal district and appellate courts and litigants with guidance. Such guidance hopefully will help to reduce the substantial transaction costs associated with resolving these environmental liability allocation disputes. Therefore, this Court should grant Harley-Davidson's petition for issuance of a writ of certiorari to the Seventh Circuit to establish the appropriate standard for applying Section 107(e)(1) of CERCLA to environmental liability allocation agreements.

STATEMENT OF THE CASE

This case involves a CERCLA cost-recovery suit brought by Harley-Davidson, Inc. ("Harley-Davidson") against Minstar, Inc. ("Minstar"), AMF Incorporated ("AMF"), and the United States of America, the United States Department of Defense, and the United

States Department of the Navy (collectively the "Navy") to compel those parties to pay their fair share to clean up the environmental pollution they caused at a manufacturing facility the Navy and, later, AMF owned and operated in Pennsylvania.

This case centers around the environmental pollution at a site in York, Pennsylvania. The Navy took title to the site in 1944, operating it until 1964 as the York Naval Ordnance Plant. The Navy sold the York site to AMF on January 31, 1964. In December 1980, AMF transferred the York Facility to its wholly owned subsidiary, AMF York, Incorporated ("AMF York"). The 1980 Acquisition Agreement between AMF and its spin-off corporation, AMF York, included the following indemnification language:

> AMF York Incorporated shall assume and discharge, and shall indemnify AMF

> Incorporated against all debts, liabilities and obligations, without any limitation, relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown . . . and whether existing on the date of this agreement or coming into existence hereafter.

On June 16, 1981, AMF sold the York Facility to Harley-Davidson, via a Purchase Agreement. The 1981 Purchase Agreement between Harley-Davidson and AMF included two relevant indemnification clauses:

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (I) any liability or obligation of AMF or any of the Companies or the Subsidiaries arising out of or resulting from an event or occurrence happening prior to the Closing Date due to non-compliance with any Federal, state or local law, regulation, order

> or administrative or judicial determination relating to the environment. . . .[1]

Section 10.5(a)(ii)(I) of 1981 Purchase Agreement. Further,

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (G) any liability or obligation in connection with the golf car business, whether arising out of an even or occurrence happening prior to, on or after the Closing Date, in excess of applicable reserves in the Adjusted Closing Balance Sheet. . . .

Section 10.5(a)(ii)(G) of 1981 Purchase Agreement. Minstar acquired AMF in 1985.

All three owners of the York Facility -- including the Navy, AMF and Harley-Davidson -- performed manufacturing operations at the site. In 1986,

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[1]AMF York was specifically designated as a "Company" in the 1981 Purchase Agreement, thus, AMF expressly indemnified Harley-Davidson for certain of AMF York's liabilities.

five years after acquiring the York Facility, Harley-Davidson conducted an environmental audit at the site and discovered significant environmental contamination. Since 1986, Harley-Davidson has investigated and cleaned up that contamination under the supervision of the Pennsylvania Department of Environmental Resources.

On July 31, 1991, Harley-Davidson filed a six-count Amended Complaint, in the United States District Court for the Eastern District of Wisconsin, against Minstar, AMF and the Navy. The Amended Complaint asserts claims against all defendants under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613. The Amended Complaint also asserts claims against Minstar and AMF under Sections 701, 702 and 705 of the Pennsylvania Hazardous Sites Cleanup

Act ("PAHSCA"), 35 Pa. Stat. §§ 701, 702, and 705.

On November 5, 1993, Judge Rudolph T. Randa, of the U.S. District Court for the Eastern District of Wisconsin, decided the first sentence of Section 107(e)(1), of CERCLA, precludes the use of any indemnification, hold harmless or similar agreement to contractually transfer the liability that one PRP owes to the Government or another PRP. The District Court further concluded the second sentence of Section 107(e)(1) permits indemnification, hold harmless and similar agreements between a PRP and a party not otherwise liable under CERCLA.

The District Court reasoned that the second sentence of Section 107(e)(1) must modify the terms of the first sentence of that section. Because CERCLA defines

liability in a different statutory section, Section 107(a), the District Court determined that the second sentence of 107(e)(1) must modify the language "any other person" in the first sentence. As the District Court concluded:

> Read this way, the second sentence permits the transfer of liability owed by a potentially responsible party to a non-liable or non-potentially responsible party, such as an insurance company.

Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. at 984.

The District Court held that the 1980 internal indemnification agreement between AMF and AMF York was ineffective, and did not shield AMF or Minstar from CERCLA liability for their pollution at the York site. In light of this holding, the District Court denied the motion of AMF and Minstar for summary judgment. The District Court did not reach the material issues of triable fact

between the parties concerning the appropriate allocation of responsibility among the parties for cleaning up the York Facility.

On February 4, 1994, the District Court certified its earlier decision for appeal pursuant to 28 U.S.C. § 1292(b), finding that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [decision] may materially advance the ultimate termination of the litigation."

The United States Court of Appeals for the Seventh Circuit accepted the interlocutory appeal on April 26, 1994. Harley-Davidson's claims against the Navy, which is not a party to this appeal, remained for disposition in the District Court.

On November 30, 1994, a three-judge panel of the Seventh Circuit reversed the District Court. Rather than treating the second sentence of Section 107(e)(1) as a modifier of the first sentence, the Seventh Circuit treated each sentence separately. Thus, the Seventh Circuit determined:

> The first sentence speaks of "transfer[ring] . . . liability, "that is, of shifting liability from one person to another. Indemnification does not do that. The party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 343.

The Seventh Circuit concluded by stating, "The indemnification agreement is enforceable and applicable, and bars Harley-Davidson's claim against these defendants." Id., at 344.

On December 28, 1994, the Seventh Circuit denied Harley-Davidson's motion for rehearing, with suggestion for rehearing en banc, without discussion.

Subsequently, Harley-Davidson moved for a stay of mandate, pursuant to Rule 41 of the Federal Rules of Appellate Procedure -- which requires that the petition for certiorari must present a substantial question -- and Circuit Rule 41 of the Rules of the Seventh Circuit -- which provides that a mandate will not ordinarily be stayed unless there is a substantial showing that the petition for certiorari raises an important question meriting review by the Supreme Court. On January 6, 1995, the Seventh Circuit granted Harley-Davidson's motion for stay of mandate to and including February 5, 1995.

FEDERAL JURISDICTION BELOW

The District Court exercised subject matter jurisdiction on the following bases: (a) federal question jurisdiction pursuant to 28 U.S.C. § 1331; (b) federal district courts have exclusive jurisdiction over all CERCLA claims pursuant to 42 U.S.C. § 9613(b); (c) supplemental jurisdiction over the PAHSCA claims pursuant to 28 U.S.C. § 1367, because they arise out of a common nucleus of operative facts and would ordinarily be tried in a single action; and (d) diversity jurisdiction pursuant to 28 U.S.C. § 1332, because at the time the suit was initiated there was complete diversity of citizenship between Harley-Davidson, a Wisconsin corporation with its principal place of business in Wisconsin, and Minstar, a Delaware corporation with its principal place of business in Minnesota, and AMF, a New

Jersey corporation with its principal place of business in Minnesota, and the amount in controversy exceeds $50,000, exclusive of interest and costs.

SUMMARY OF ARGUMENT

"The tendency of the law must always be to narrow the field of uncertainty." Oliver Wendell Holmes, Common Law 127 (1881).

"CERCLA's provision regarding indemnity clauses is truly murky. . . ." Jones-Hamilton v. Beazer Materials & Services, 973 F.2d 688, 692 (9th Cir. 1992). Section 107(e)(1) of CERCLA, 42 U.S.C. § 9607(e)(1), "taken as a whole is notably obscure. . . ." Harley-Davidson, Inc. v. Minstar Inc., 41 F.3d at 342. The first sentence is "mysterious." Id., at 343. It has also been said, "[Section 107(e)(1)] appears internally inconsistent." Beazer East v. The Mead Corp., 34 F.3d 206, 211

(3d Cir.), reh'g denied (1994). Until this Court definitively clarifies Section 107(e)(1) of CERCLA, the mystery and uncertainty surrounding its intended meaning will persist.

Section 107(e)(1)'s enigmatic nature lies at the heart of why this Court should grant certiorari in this case. This Court has not addressed whether indemnification agreements between PRPs are prohibited under Section 107(e)(1) of CERCLA.

In addition to clarifying the meaning of Section 107(e)(1) of CERCLA, this Court should grant certiorari in this case in order to remedy the errors committed by the Seventh Circuit Court of Appeals. Specifically, the Seventh Circuit decided disputed, material factual issues in this case not yet addressed by either the parties or the District Court. Further, the Seventh Circuit did not

apply the proper rules of construction for indemnification agreements. By rectifying the errors committed by the Seventh Circuit, this Court will be able to clarify whether equitable factors -- in addition to indemnification agreements -- must be considered before equitably allocating liability among PRPs, whether post-CERCLA indemnification agreements must specify CERCLA or environmental liabilities to be effective, and whether state-law principles of contract interpretation, such as the canon that ambiguous indemnification agreements are to be construed against the drafter, should be applied. Finally, if not addressed, the Seventh Circuit's errors will bar Harley-Davidson's CERCLA claims against AMF and Minstar in connection with the cleanup of the York facility.

I. THIS COURT HAS NOT DECIDED THE IMPORTANT QUESTION OF WHETHER SECTION 107(e)(1) OF CERCLA PERMITS INDEMNIFICATION AGREEMENTS BETWEEN POTENTIALLY RESPONSIBLE PARTIES.

The Supreme Court should grant Harley-Davidson's petition for writ of certiorari because the Seventh Circuit decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States. Rule 10.1(c) of the Rules of the Supreme Court of the United States.

There are an estimated 40,000 hazardous waste sites awaiting federal evaluation and response. Steven Ferrey, The New Wave: Superfund Allocation Strategies and Outcomes, 25 Environment Reporter 790 n. 4(8/26/94)(citing U.S. EPA, CERCLA-3rd Quarter FY 92 Superfund Management Reporter, June 30, 1992). The average cleanup cost per site is approximately $25 million. EPA Enforcement, 23

Envtl. L. Rep. (Envtl. L. Inst.) 10,179, 10,251 (April 1993)(citing Department of Justice environmental enforcement statistic that site cleanups average nearly $25 million); Eve L. Pouliot, Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund), 47 SMU L. Rev. 607, 638 (FN 145)(citing 40 C.F.R. pt. 300 (1992))(The average total cost of a remedial site cleanup is $27.8 million). Based on these estimates, the nationwide cleanup "bill" will total $1 trillion dollars. Undoubtedly, many of the parties saddled with those cleanup costs will look for contribution from other parties, including the purchasers and sellers of the polluted sites. Typically, purchasers and sellers of real estate attempt to allocate cleanup liability through use of indemnity clauses in purchase and sale contracts.

Despite the obvious need for clear, consistent law to guide contracting parties, courts and litigants, CERCLA's indemnification section -- Section 107(e)(1) -- remains shrouded in mystery. The Seventh Circuit's recent opinion in Harley-Davidson continued the pattern of federal district and appellate courts being forced to construct strained interpretations of an important, yet cryptic, statutory provision of CERCLA to resolve disputes between PRPs over how to equitably allocate cleanup costs.

Section 107(e)(1) of CERCLA provides:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or

> indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1).

Section 107(e)(1) of CERCLA should be definitively interpreted by this Court. Section 107(e)(1) can be, and has been, read to either prohibit indemnification agreements[2] or to permit such agreements.[3] See Danella South-

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[2]E.g., Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993), rev'd, 41 F.3d 341 (7th Cir.), reh'g denied (1994); CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991), reconsideration denied sub. nom, U.S. v. Cordova Chemical of Michigan, 1991 WL 111515 (W.D. Mich., March 26, 1991); AM Intern., Inc. v. International Forging Equipment, 743 F. Supp. 525 (N.D. Ohio 1990), rev'd in part, 982 F.2d 989 (6th Cir. 1993); Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990).

[3]E.g., Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir. 1994); Beazer East, Inc. v. Mead Corp., 34 F.3d 206 (3d Cir. 1994); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993); John S. Boyd Co., Inc., v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993); Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993);

west v. Southwestern Bell Telephone, 775 F. Supp. 1227, 1240 (E.D. Mo. 1991), aff'd, 978 F.2d 1263 ("The first section of this obscure provision appears to prohibit indemnification agreements under all circumstances, while the second section appears to permit indemnification agreements under all circumstances"). This confusion should not be permitted to persist.

To date, eight United States Circuit Courts of Appeals have answered the question of whether indemnification agreements between potentially responsible parties are barred by Section 107(e)(1) of CERCLA.[4] Although it

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U.S. v. Hardage, 985 F.2d 1427 (10th Cir. 1992).

[4]John S. Boyd, Inc. v. Boston Gas Co., 992 F.2d 401; Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10; Beazer East, Inc. v. Mead Corp., 34 F.3d 206; Joslyn Manufacturing Co. v. Koppers Company, Inc., 40 F.3d 750 (5th Cir. 1994); Niecko v. EMRO Marketing Co., 973 F.2d 1296 (6th Cir. 1992); Harley-Davidson,

is true that none of these courts have reached the conclusion set forth by the District Court in the case at bar, the majority of these courts have not undertaken a careful and well-reasoned analysis of the statute. Further, the courts of appeals do not uniformly agree on the proper method of interpretation of CERCLA Section 107(e)(1).

The history of the interpretation of CERCLA Section 107(e)(1) by the courts of appeals is rife with inadequate analyses of the statutory language. Instead, the courts have often reached conclusions without supporting rationale. See, e.g., U.S. v. Hardage, 985 F.2d 1427, 1433 (10th Cir. 1993)("The plain meaning of this language is that, although responsible parties may not

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Inc. v. Minstar, Inc., 41 F.3d 341; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986); U.S. v. Hardage, 985 F.2d 1427.

altogether transfer their CERCLA liability, they have the right to obtain indemnification for that liability"). Those conclusions are then relied upon by other courts and adopted without reasoned discussion. The result is a string of decisions reached without any real analysis, discussion or apparent reasoning.

For example, the Second Circuit's opinion in Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993), merely adopted the underlying district court conclusion. The district court, in turn, arrived at its conclusion by adopting the Ninth Circuit's opinion in Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986). Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992), aff'd in part, vacated in part, 5 F.3d 10 (2d Cir. 1993).

However, the Ninth Circuit's opinion did not focus on the validity of indemnification agreements under CERCLA. Rather, the Mardan opinion addressed whether state law or federal common law governed the interpretation of agreements for indemnification of environmental liabilities. In fact, the extent of the Ninth Circuit's discussion of Section 107(e)(1), as it relates to the permissibility of indemnification agreements between PRPs, resides in a single sentence:

> "As the government points out, section 107(e)(1) expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under section 107(a)."

Mardan Corp., 804 F.2d at 1459. There is no discussion, analysis, or reasoning contained within the Ninth Circuit's opinion to support its conclusion. Further, there is not even a mention of,

what other courts term, the "apparent internal inconsistency" of the language of CERCLA Section 107(e)(1). See, e.g., Beazer East, Inc. v. Mead Corp., 34 F.3d at 211 ("On first reading, this appears internally inconsistent").

A matter as important as the validity of indemnification agreements under CERCLA should not be allowed to be decided without reasoned analysis. This is a matter which should be specifically addressed and decided. There is no better forum for this matter to be definitively resolved than the Supreme Court.

In addition to the variance of conclusions reached by courts addressing CERCLA Section 107(e)(1), federal courts have also utilized different methods of interpreting the statutory language. One group in effect ignores Section 107(e)(1)'s first sentence,

simply finding that PRPs may allocate CERCLA liability. See Folino v. Hampden Color and Chemical Co., 832 F. Supp. 757, 760 (D. Vt. 1993); U.S. v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1013 (D.S.C. 1984), Aff'd in part and vacated in part sub. nom., U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

A second group of courts interpreting CERCLA Section 107(e)(1) finds, without explaining its method of interpretation, that the right of private parties to enter indemnification agreements is preserved. Commander Oil v. Advance Food Service Equipment, 991 F.2d 49, 51 (2d Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d at 1458.

Yet another group of courts, recognizes the inconsistency of the two sentences of CERCLA Section 107(e)(1) and

acknowledges that the second sentence should modify the first. Unfortunately, these courts then employ an incorrect method of harmonizing the two sentences. Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d at 14; John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 405 (1st Cir. 1993); U.S. v. Hardage, 985 F.2d at 1433; AM Intern. v. International Forging Equipment, 982 F.2d 989, 994 (6th Cir. 1993), citing Niecko v. Emro Marketing Co., 973 F.2d 1296, 1300 (6th Cir. 1992).

Federal courts also have struggled with the concept of whether an environmental allocation agreement or indemnity clause must specifically reference "CERCLA-like" liability or at least environmental liability in order to satisfy CERCLA Section 107(e)(1). See, e.g., Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)(no

"clear transfer or release of future 'CERCLA-like' liabilities"). Even though AMF entered into the 1980 indemnity agreement with AMF York after CERCLA was enacted, the contract did not refer to CERCLA in particular and did not mention environmental liability in general. A clear, express allocation of CERCLA liability between AMF and AMF York was lacking in the 1980 agreement. Nevertheless, the Seventh Circuit stated in the case at bar: "Harley-Davidson argues that the agreement is not broad enough to cover the contamination of the York site. But it could not be more broadly worded." Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 344. Given the CERCLA principle that the polluter should pay, the breadth of an indemnity clause should not be as important a factor in determining its enforceability under CERCLA Section 107(e)(1) as is the question of

whether it expressly and unequivocally allocates CERCLA liability.

Because CERCLA Section 107(e)(1) has not been subjected to a thorough analysis at the court of appeals level, and because courts throughout the United States are not in complete uniformity in either results or methods of interpretation, this Court should grant certiorari in this case.

Whether indemnification agreements between potentially responsible parties are prohibited by CERCLA Section 107(e)(1) -- or whether they are permissible only under certain situations -- will remain unresolved until this Court makes the final determination. By addressing the question of what Congress intended in CERCLA Section 107(e)(1), this Court would also have the opportunity to articulate whether other equitable factors in

addition to the existence of an indemnity contract should be considered when equitably allocating CERCLA liability between PRPs.

II. THE SEVENTH CIRCUIT APPARENTLY DID NOT CONSIDER ANY EQUITABLE FACTORS OTHER THAN THE 1980 INDEMNIFICATION AGREEMENT BETWEEN AMF AND AMF YORK.

The method courts utilize to allocate liability between responsible parties under CERCLA is an important question that this Court should address. Until the Seventh Circuit's recent decision in Harley-Davidson, the Seventh Circuit indicated that in implementing Congressional intent courts should look to various equitable factors in determining allocation among responsible parties under CERCLA. The court's most recent opinion, however, appears to vitiate both its own precedent and legislative intent.

In Kerr-McGee Chemical v. Lefton Iron & Metal, 14 F.3d 321 (7th Cir.), reh'g denied (1994), the Seventh Circuit apparently recognized that contractual agreements between parties are not necessarily determinative of statutory liability. Id., at 326. Based on this principle, it follows that even if CERCLA Section 107(e)(1) allows contractual transfers of CERCLA liability, such contractual transfers will not necessarily serve to determine statutory liability.

The Seventh Circuit previously held that the following equitable factors, taken together, should be considered in allocating CERCLA Section 107 liability: (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous

waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; (6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment (all of the aforementioned constitute the so-called "Gore factors");[5] (7) the parties' relative

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[5]The "Gore factors" were originally part of an amendment to the 1980 House Superfund Bill which did not pass. Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th. Cir. 1992), citing U.S. v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

fault; and (8) any contracts between the parties bearing on the allocation of cleanup costs. Id., at n. 4.

The Seventh Circuit's recent opinion in Harley-Davidson, however, appears to contradict its earlier holding in Kerr-McGee. The Harley-Davidson opinion, in effect, appears to create a rule that a court may completely determine allocation among PRPs based solely on an indemnification agreement. Specifically, the Seventh Circuit concluded that the indemnification agreement between AMF York and AMF "bars Harley-Davidson's claim. . . ." Harley-Davidson, Inc. v. Minstar, Inc., 41 F. 3d at 344. Further, because this case was before the Seventh Circuit on interlocutory appeal, the District Court had not addressed the equitable factors listed above.

The Seventh Circuit held, in effect, that a broadly worded indemnification agreement obviates the need to inquire into any other equitable factors before allocating liability between responsible parties. While it is not disputed that the Seventh Circuit may overrule its own line of decisions, this Court should not uphold the Seventh Circuit's newest pronouncement of CERCLA law. The Seventh Circuit's holding contravenes legislative intent that other equitable factors be considered when equitably allocating liability between responsible parties.

The Seventh Circuit has noted that "the language and legislative history of the new contribution section [Section 113 of CERCLA] indicates, at the very least, Congress's intent that courts should equitably allocate costs of clean-up. . . ." Environmental Trans.

Systems v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992)(citing U.S. v. Monsanto Co., 858 F.2d at 173 n. 29). The Seventh Circuit further stated, "Like the Court of Appeals for the Sixth Circuit, we think a court may consider any factors appropriate to balance the equities in the totality of the circumstances." Environmental Trans. Systems v. Ensco, Inc., 969 F.2d at 509 (citing U.S. v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991)).

The Seventh Circuit's own decisions, relying on decisions from other courts of appeals, show that courts should look at the "totality of the circumstances" and equitably allocate liability. As the Seventh Circuit observed, such a rule furthers the legislative intent behind Section 113(f) of CERCLA.

The Supreme Court should grant certiorari in this case in order to answer an important question of federal law. Specifically, this Court should determine whether a court, in allocating CERCLA liability among responsible parties, may ignore most of the relevant equitable factors -- to the point of not even hearing evidence on most of them -- and allocate purely on the basis of an indemnification agreement between the parties.

Thus, it would be inconsistent with Section 113 of CERCLA to bar Harley-Davidson's claims against Minstar and AMF before the District Court has considered the evidence and had an opportunity to equitably allocate CERCLA response costs among the parties.

III. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COMMITTED JUDICIAL ERRORS IN THIS CASE THAT WILL GO UNREMEDIED IF THE SUPREME COURT DOES NOT GRANT CERTIORARI.

This Court should exercise its supervisory authority in this case because: (1) the Seventh Circuit either read only one of the two indemnification agreements essential to this case or tacitly decided disputed factual matters without permitting evidence to be taken by the District Court; and (2) the Seventh Circuit did not apply the applicable rule of contract interpretation in construing the one indemnification agreement it did consider. Exercising supervisory authority would be especially appropriate here, as the question of which law to apply when interpreting indemnification contracts -- federal common law or traditional state contract interpretation law -- is relevant to the standard the Court should

articulate for a federal district court to follow when applying CERCLA Section 107(e)(1) to an indemnification agreement between PRPs.

A. The Seventh Circuit Appears to Have Relied On Only One Of The Two Essential Indemnification Agreements In This Case.

The Seventh Circuit stated, "The buyer [AMF York and, subsequently, Harley-Davidson] had agreed to indemnify the seller against all liabilities relating to the division of the seller (called the AMF York Division) that owned the plant." Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 342. This seemingly innocuous statement reveals a serious error underlying the Seventh Circuit's opinion.

First, although only one was ever mentioned by the Seventh Circuit, there were two agreements between the parties containing indemnification

clauses. As noted earlier, the 1980 Acquisition Agreement between AMF and AMF York included the following indemnification language:

> AMF York Incorporated shall assume and discharge, and shall indemnify AMF Incorporated against all debts, liabilities and obligations, without any limitation, relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown . . . and whether existing on the date of this agreement or coming into existence hereafter.

In addition, explicit language in a 1981 Purchase Agreement between Harley-Davidson and AMF provided the following indemnifications running from AMF to Harley:

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (I) any liability or obligation of AMF or any of the Companies or the Subsidiaries arising out of or resulting

> from an event or occurrence happening prior to the Closing Date due to non-compliance with any Federal, state or local law, regulation, order or administrative or judicial determination relating to the environment. . . .

Section 10.5(a)(ii)(I) of 1981 Purchase Agreement. Further,

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (G) any liability or obligation in connection with the golf car business, whether arising out of an even or occurrence happening prior to, on or after the Closing Date, in excess of applicable reserves in the Adjusted Closing Balance Sheet. . . .

Section 10.5(a)(ii)(G) of 1981 Purchase Agreement.

Even assuming the 1980 Acquisition Agreement's indemnification language would "bar[] Harley-Davidson's claim against these defendants," Harley-Davidson Inc. v. Minstar, Inc., 41 F.3d at 344, the indemnification to Harley-

Davidson, contained within the 1981 Purchase Agreement, preserves Harley-Davidson's right to demand at least some contribution from AMF and Minstar.

In order for the Seventh Circuit to reach the conclusion it did -- Harley-Davidson's claims against AMF and Minstar are barred -- the Seventh Circuit appears to have done one of two things: either (a) it completely ignored the indemnification provisions found in the 1981 Purchase Agreement; or (b) it found the 1981 Purchase Agreement inapplicable without stating any justification for doing so. In effect, the Seventh Circuit determined triable factual issues -- such as whether the liability related to the AMF York golf car business was in excess of the Adjusted Closing Balance Sheet -- without allowing the District Court to resolve those disputed issues of fact after developing the evidentiary record.

The Seventh Circuit took this case on interlocutory appeal. The narrow issue decided by the District Court, and briefed and argued by the parties, was limited to whether indemnification agreements are prohibited by Section 107(e)(1) of CERCLA. The factual record as to the other disputed issues is incomplete, as the parties involved expected the case to be remanded to the District Court to develop and determine the remaining questions of fact.

While the Seventh Circuit's authority to decide issues not specifically certified for interlocutory appeal is not questioned, Peterson v. Sealed Air Corp., 902 F.2d 1232, 1233 (7th Cir.), reh'g denied (1990), an appellate court should limit itself to deciding only issues plainly put forth in the record in as complete a form as is required for final determination of the

legal principles involved. 16 Charles A. Wright, et al., Federal Practice and Procedure, § 3921 (1977). In this case, the Seventh Circuit went beyond the factual record and committed prejudicial error.

Whether the Seventh Circuit ignored one of the two crucial indemnification agreements in this case -- documents both parties agreed were essential to the case -- or found the second agreement inapplicable, the Seventh Circuit appears to have departed from the accepted and usual course of judicial proceedings. This Court should exercise its supervisory power and correct the serious error committed in this case.

B. The Seventh Circuit Did Not Apply The Proper Rules For Construing Indemnification Agreements.

The second error underlying the Seventh Circuit's opinion in Harley-

Davidson is that the court did not apply the proper rule of interpretation for indemnification agreements. If the Seventh Circuit had properly applied the law of Pennsylvania, or even the law of any other state relevant to this case, it would have concluded that the indemnification language in the 1980 Purchase Agreement is ambiguous, and as such should be construed against AMF, the drafter of the ambiguous language.

While it is well settled that federal law governs issues relating to the validity of a release of a federal cause of action, Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L.Ed. 398 (1952), every Court of Appeals addressing this issue has applied state rules of contract law in interpreting CERCLA indemnification agreements. Tippins Inc. v. USX Corp., 37 F.3d 87 (3d Cir. 1994); Fisher

Development Co. v. Boise Cascade Corp., 37 F.3d 104, 109 (3d Cir. 1994); Beazer East Inc. v. The Mead Corp., 34 F.3d 206; Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d at 14-15; John S. Boyd Co., Inc. v. Boston Gas Co., 992 F.2d at 406; United States v. Hardage, 985 F.2d at 1433 n. 2; Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d at 1457-60.

Pennsylvania law should apply here because the York facility is located in Pennsylvania, AMF York was a Pennsylvania corporation, and Pennsylvania has the strongest governmental interest in the remediation of the York facility and, hence, the disposition of this case. See Restatement (Second) Conflict of Laws §§ 222, 224(2) (1971); Tippins Inc. v. USX Corp., 37 F.3d 87.

Pennsylvania law mandates that "while a party may contract for indemnification for its own torts, 'the language

in the indemnity provision must be clear and unequivocal and the burden is even greater where such party drafted the agreement.'" Tippins, Inc. v. USX, 37 F.3d at 91 n. 4(quoting DiPetro v. City of Philadelphia, 496 A.2d 407, 410 (Pa. Super. 1985)).

"A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986). The express terms of the 1980 indemnification contract between AMF and AMF York limit the extent of indemnification to the AMF York Division, its operations and products. That clause does not address the operations or products of AMF's other divisions or subsidiaries which also polluted the York facility. Furthermore, the 1980 indemnification clause does not

speak to liabilities resulting from AMF's ownership of the York facility. Finally, the 1980 indemnification clause does not cover any potential CERCLA generator liability of AMF's divisions or subsidiaries, with the exception of the AMF York Division.

While Harley-Davidson contends that the 1980 indemnification contract -- if enforceable under CERCLA -- explicitly limits the indemnification running from Harley-Davidson to AMF York to those liabilities incurred by the York Division, the very least that can be said is that the 1980 indemnification contract is ambiguous. Because the indemnification contract is ambiguous, the Seventh Circuit should have construed it against AMF, the drafter of the indemnification clause.[6] The Seventh Circuit erred by

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[6]All of the states relevant to this case -- Pennsylvania, Wisconsin, New York and New Jersey -- provide similar rules

construing the ambiguous 1980 indemnity agreement in favor of AMF.

The Seventh Circuit departed from the accepted and usual course of judicial proceedings by not adhering to the applicable law governing the interpretation of the indemnification language in this case. For this reason, this Court should issue a writ of certiorari in this case.

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of interpretation for indemnification agreements. See, e.g., Spivey v. Great Atlantic & Pacific Tea Co., 255 N.W.2d 469 (Wis. 1977)(If a party seeks to be indemnified against its own negligence, then the indemnification agreement must specifically provide as such.); Gross v. Sweet, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365, 367 (Ct. App. 1979)(An exculpatory clause will not be deemed to insulate a party from liability for his negligent acts unless the intention of the parties is expressed in unmistakable language.); Ramos v. Browning-Ferris Industries of South Jersey, 103 N.J. 177, 191, 510 A.2d 1151 (N.J. 1986)(A contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.).

CONCLUSION

Granting certiorari in this case will allow the Supreme Court to enunciate a clear, nationwide standard for applying CERCLA Section 107(e)(1) to allocation contracts while at the same time remedying the errors of law contained in the Seventh Circuit's decision. Rectifying the Seventh Circuit's errors would further clarify the appropriate CERCLA 107(e)(1) standard for determining the enforceability of an indemnification agreement under CERCLA. Specifically, rectifying the Seventh Circuit's errors would allow this Court to determine whether federal district and appellate courts need to evaluate the totality of equitable circumstances, including all relevant contracts between the parties, before allocating liability between PRPs.

Further, by granting certiorari in this case, this Court would have the

opportunity to clarify the requirements a post-CERCLA indemnification agreement must satisfy to be effective and to specify whether federal courts must apply state law principles of contract construction, such as the canon that any ambiguity in an indemnification agreement must be resolved against the drafter, in this case, AMF, when evaluating the enforceability of such an agreement under CERCLA Section 107(e)(1).

For these reasons, Harley-Davidson respectfully requests that this Court issue a writ of certiorari in this case.

Respectfully submitted this 2nd day of February, 1995.

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